IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL REVISION APPLICATION NO. 5 OF 2004.

Hanumant Nagvekar,
S/o Laldu Nagvekar,
R/o House No.127,
Santa Waddo,
Calangute, Goa. ..... Petitioner.

Versus

State (through Margao
Police Station). ..... Respondent.

Shri Arun Bras D'Sa, Advocate for the Petitioner.

Shri S.N. Sardessai, Public Prosecutor for the State/Respondent.

CORAM: N. A. BRITTO, J.

DATE: 8th/ 15th OCTOBER, 2004.

ORAL JUDGMENT:

This revision is filed by the accused in Criminal Case No. 42/S/2002.

2. There is no dispute that the accused was the driver of the KTC Bus No. GA-01-X0062 which met with an accident on National Highway No.17 on 14.1.2001 at about 16.00 hrs., at a distance of about 1 km. or so from KTC bus stand at Margao involving Tata Mobile bearing No.GA-02 C-8164 driven by Peter Rodrigues who died in the said accident along with another occupant of the said Tata

Mobile by name Peter Dias. Only John J. Fernandes, another occupant of the Tata Mobile survived the said accident to tell the story as to how it took place.

3. The accused was charged and tried under Sections 279, 304A and 337 of I.P.C.

4. The learned J.M.F.C. by her Judgment/Order dated 30.10.2003/5.11.2003 convicted and sentenced the accused to five months simple imprisonment under S.279 I.P.C. and to pay a fine of Rs.500/- in default to undergo one month of simple imprisonment; under Section 337 I.P.C., to undergo simple imprisonment for one month and to pay a fine of Rs.200/- and in default to undergo simple imprisonment for fifteen days; and under Section 304A to undergo simple imprisonment of two years and to pay a fine of Rs.1000/- and in default to undergo simple imprisonment for two months.

5. The said Judgment/Order came to be confirmed by the learned Assistant Sessions Judge by his Judgment/Order dated 1.3.2004. The learned Assistant Sessions Judge only ordered that the sentences imposed should run concurrently.

6. The case of the prosecution was that the accused drove the said KTC bus in a rash and negligent manner endangering the lives and safety of others and collided with the said Tata Mobile thereby causing death of two occupants

namely Peter Dias and Peter Rodrigues and injuries to the said Jose Fernandes.

7. The accused pleaded not guilty. The case of the accused, as it appears from the statement recorded under S.313 of the Code is that the said accident took place as the steering of the Kadamba bus failed. It can also be seen from the cross-examination of P.W.6 John Fernandes that the accused had also taken a plea that the brakes of the Mini bus (steering) failed when he applied the said brakes to avoid a collision to a Mini bus which was being overtaken by the said Peter Rodrigues driving the said Tata Mobile.

8. In the course of the trial the prosecution had examined as many as nine witnesses. The accused had examined none in support of the defence taken by him. Amongst the said witnesses who were examined by the prosecution were P.W.1 Umesh Naik to prove the panchanama of the scene of accident which was prepared by P.W.7 Desai. P.W.4 Dr. Pujari was examined to prove the death of the said driver Peter Rodrigues, whose age has been shown as 19 years and the other occupant of the Tata Mobile by name Peter Dias. P.W.8 Sankhwalkar produced the photographs taken of the scene. P.W.3 Dessai who was Conductor of the said KTC bus stated that at the time of the accident he was busy doing the accounts of the journey sitting on the conductor's seat and he had noticed the accident only after hearing a big sound. Obviously his evidence was not of much assistance to the case of the prosecution, apart from the fact that

P.W.3 Dessai also stated that the accident had taken place on the Highway road which was straight.

9. Both the Courts below have placed reliance on the testimony of the sole eye witness namely P.W.6 John Fernandes who was one of the occupants of the said Tata Mobile, in convicting the accused.

10. At the time of hearing, Shri Arun B. D'Sa, the learned counsel of the accused, as well as Shri S.N. Sardessai, the learned Public Prosecutor has placed reliance on the case of **State of Kerala v. Puttumana Illath Jathavedan Namboodiri [(1999) 2 S.C.C. 452]**. Shri Bras D'Sa has also placed reliance on a Judgment of this Court in Criminal Revision Application No. 9/2004 decided on 1st July, 2004 wherein this Court relying on the said case of State of Kerala (supra) has observed that :-

" Both the learned Courts below have overlooked essential parts of evidence and have based their conclusion upon extraneous matters. In other words, both the learned Courts below have failed to notice some basic and glaring features in the evidence of the witnesses and have superficially treated the same as corroborative evidence to the evidence of P.W.1 Evita Fernandes. "

Indeed the Supreme Court in the case of State of Kerala v. Puttumana Illath (supra) had observed that :-

" Ordinarily, therefore, it would not be appropriate for the High Court to re-appreciate the evidence and come to its own conclusion on the same when the evidence has already been appreciated by the Magistrate as well as the Sessions Judge in appeal, unless any glaring feature is brought to the notice of the High Court which would otherwise tantamount to gross miscarriage of justice. "

11. Shri Sardessai, the learned P.P. Has submitted that this is only a revision petition where re-appreciation of prosecution evidence is not permissible and in this context Shri Sardessai has placed reliance on the case of **State of Maharashtra v. Jagmohan Singh Kuldip Singh Anand and others (2004 AIR SCW 4767)**. In this case the Supreme Court had observed that :-

" The Revisional Court is empowered to exercise all the powers conferred on the Appellate Court by virtue of the provisions contained in S.401 Cr.P.C. S.401 Cr.P.C. is provision enabling the High Court to exercise all powers of Appellate Court, if necessary, in aid of power of superintendence or supervision as a part of power of revision conferred on the High Court or the Sessions Court. Section 397 Cr.P.C. confers power on the High Court or Sessions Court, as the case may be, for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed and as to the regularity of any proceeding of such inferior Court. It is for the above purpose, if necessary, the

High Court or Sessions Court can exercise all appellate powers. Section 401, Cr.P.C. conferring powers of Appellate Court on the Revisional Court is with the above limited purpose. The provisions contained in S.395 to S.401 Cr.P.C. read together, do not indicate that the revisional power of the High Court can be exercised as a second appellate power. "

12. Both the Courts below have placed reliance on the evidence of P.W.6 Jose Fernandes for the purpose of convicting the accused. In fact, the learned Trial Court observed and, in my view, rightly that on behalf of the accused various suggestions even contradictory to each other were put to different witnesses. The learned first Appellate Court, as regards the evidence of P.W.6 John Fernandes had this to say :-

"...The deposition of P.W.6, who is the sole eye witness examined brings out that on that day he was travelling in the Tata Mobile which was proceedings on the road from Margao towards Cortalim. After they had crossed the KTC bus stand at Margao and had reached about 1 km. ahead, the Kadamba bus came from the opposite direction in a fast speed and gave a dash against the jeep which was in slow speed. He has deposed that the Kadamba bus came on their side and gave them a dash and thereafter the Kadamba bus went in a field towards the side of the road. He has also deposed that the accident took place on the straight road and on both sides

there are fields and two buses can pass on the road at the same time. Again I find that this witness was not at all shaken in his cross-examination ... “ “ .... His deposition clearly brings out that the accident took place as the Kadamba bus being in a fast speed came towards its right side i.e. on the wrong side of the road and dashed the Tata Mobile which was going on the opposite direction on its correct side. “ The evidence on record shows that the accident took place on the National Highway 17.

15th October, 2004.

13. On behalf of the accused it is submitted that both the Courts below have come to the conclusion that the accused was rash or negligent on the basis of the inadmissible evidence and that admissible evidence was shut off. It is further submitted that incriminating statements were also not put to the accused and in fact the contradictions brought on record were not given due consideration. It has been submitted that there was no evidence that the accused was driving in a rash or negligent manner.

14. Referring to the evidence of P.W.7 A.S.I. Shri Sail it has been submitted that it was incumbent upon him to have pointed out where the point of impact was and in absence of the same, the accused could not be convicted. On behalf of the accused reliance has been placed on the case of **Nageshwar Sh. Krishna Ghobe v. State of**

Maharashtra (A.I.R. 1973 S.C. 165) wherein the Supreme Court observed that :-

" Examination of the marks of wheels on the road would have been very useful in appreciating other evidence. What is more surprising is that even evidence on the state of the traffic on the road at the relevant time and on the height of the kerb has not been produced. The Supreme Court in this case also observed that :-

" No doubt when an accident like the present takes place one naturally expects the driver concerned to explain the circumstances in which he was obliged to take the bus on to the footpath and to strike against the electric pole with such force, thereby killing one human being and injuring several others. The satisfactory nature of the explanation to absolve him of his criminal liability for the accident has, in such circumstances, to be appraised in the light of the entire evidence on the record. The onus of course remains on the prosecution and does not shift to the accused. The evidence of the bus, however, having mounted on to the footpath, which, in the normal course, does not happen, is admissible and has to be duly taken into account in understanding and evaluating the entire evidence led in the case and in appraising the value of the explanation given by the accused for his compulsion which resulted in the accident. "

15. In my opinion and as already stated, both the courts below have rightly placed reliance on the evidence of P.W.6 John Fernandes who

was admittedly travelling in the said Tata Mobile sitting at the back of the driver. In my opinion there are no glaring features which have been overlooked by both the Courts below. P.W.6 John had stated that the KTC bus was in a fast speed. His attention was drawn to his statement recorded by the Police that before the Police he had not stated that the bus was fast. Even assuming that the said omission was proved as a contradiction, the same was insufficient to discard his entire evidence. In fact, there is no foundation in his cross-examination to find out whether he knew driving or not and in such a situation reliance on the case of **Madhukar V. Kulkarni v. State of Maharashtra (1983 (1) Bom. C.R. 307)** is totally misplaced. In this case this Court had observed that unless a passenger is conversant with driving it is difficult to rely upon his evidence to determine whether the bus was driven in fast speed or otherwise. The learned first appellate court was right in observing that the defence was unable to shake him in his cross-examination. The point of impact in a given situation is not always relevant and P.W.7 A.S.I Sail had stated that due to oversight he had not shown the spot of impact on the sketch. In my view I have my own doubt whether such a spot could at all be shown in the manner the accident took place. P.W.6 John Fernandes has clearly and categorically stated that the KTC bus came in the opposite direction and in a fast speed and gave a dash to their jeep which was in slow speed. This evidence of P.W.6 John Fernandes was sufficiently corroborated by circumstantial evidence. For example, the photographs show that the dash took

place on the right-hand side of the Tata Mobile. The sketch, the panchanama as well as the said photographs further show that the KTC bus driven by the accused went further to the right and fell into the adjoining paddy field on the wrong side of the road. The accused gave several explanations to this situation. At one stage he tried to put forward the theory that he applied brakes and the brakes failed. At another stage he put up a theory that his steering had failed. The accused as a driver should know that failure of brakes is different from failure of steering. P.W.6 John Fernandes who is a teacher by profession categorically denied that the accused did not have any occasion to brake or for that matter the accident had taken place because of the failure of either the brakes or the steering. Moreover, P.W.5 the M.V. Inspector Shri Sawant even denied the suggestion that there was possibility that there were defects in the steering prior to the accident or in normal condition. In case there was any technical fault in the bus driven by the accused, it is certainly probable that the accused would have told the same immediately to P.W.3 Shri Dessai who was conductor of the said KTC bus and he, in turn, could have deposed about the same before the court. The plea of failure of brakes or for that matter the plea of the failure of steering taken by the accused are nothing but an afterthought to explain the accident of losing control of the vehicle and going to the right side of the road and dashing against the said Tata Mobile and then landing into the adjoining paddy field. In my view this is not a case where inadmissible evidence has been considered by both the

courts below nor a case where any admissible evidence has been shut off. A denial to the suggestion put to a witness is certainly not required to be put to the accused to be explained at the time of recording the statement of the accused under Section 313 of Cr.P.C. as incriminating circumstance appearing in the evidence of the prosecution.

16. On behalf of the accused, reference is also made to some suggestions put to P.W.6 John Fernandes that the said driver of Tata Mobile Peter Rodrigues did not have a valid driving licence. Reference has also been made to the case of **Syad Akbar v. State of Karnataka [(1980) 1 S.C.C. 30]** to say that the case could be one of misjudgment and not negligence. As far as the suggestions to P.W.6 John Fernandes, the plea that Peter Rodrigues was in fact not having a driving licence has only remained in the realm of suggestions and has not been proved by the accused even by preponderance of probabilities and in the absence of any evidence in that regard and based merely on suggestions it is not possible to conclude that the said Peter Rodrigues had a learner's licence and was driving the Tata Mobile on the basis of the said learner's licence. This is a case where the accident took place as stated by P.W.3 Dessai on a straight highway road and as stated by P.W.7 A.S.I. Sail the road was wide enough to allow two vehicles to pass simultaneously. P.W.6 has also stated that at the time of accident it was not raining and even prior to that it had not rained. The facts

show that it is because of the fast speed with which the bus was driven that the bus went on the wrong side of the road, dashed against the Tata Mobile and landed further into the field on the wrong side of the road. This shows that the accused was driving the bus rashly and has been rightly convicted by both the courts below.

17. No other point has been raised on behalf of the accused in this revision petition.

18. Consequently, I find that there is no merit in this petition and therefore the same is hereby dismissed.

N. A. BRITTO, J.

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